IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION 6
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
TUESDAY, JANUARY 12, 2010
A.M. SESSION

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Volume 1

Hearing on Motions
Re-examination Of Conditions Of Release
DNA Related Testimony
Prosecutorial Misconduct

LISA A. CHANEY, RPR, CSR, CR
Certified Reporter
Certificate No. 50801

ORIGINAL

January 12, 2010
9:32 a.m.

APPEARANCES:
FOR THE STATE: MR. JOE BUTNER, DEPUTY.
ALSO PRESENT: MS. DEB COWELL, PARALEGAL.
FOR THE DEFENDANT: MR. JOHN SEARS,
MR. LARRY HAMMOND, AND MS. ANNE CHAPMAN.

THE COURT: This is the time set for hearing of a number of motions in State versus Steven DeMocker, CR 2008-1339. Mr. Hammond, and Ms. Chapman, Mr. Sears for the defense. Defendant is present as well. Mr. Butner for the State.

The motions that I have pending are all defense motions, and prior to going on in the record I met with Counsel in chambers to get some idea of the order in which you would like to address them, and there doesn't seem to be a big dispute about taking them, generally speaking, in the order that they are listed.

So what would you like to proceed with?

MR. SEARS: Your Honor, before we get started Mr. Hammond would like to introduce a colleague of ours that is with us today.

MR. HAMMOND: Your Honor, we are honored today to have a guest with us, Ann Sarah Cooper, who is from the University of Central England in Birmingham, England. She served as an intern while in law school with our law firm during a death penalty case that we did in the summer of

2007.

She's now graduated and has gone on to barrister school in England and she has come back to recruit projects to place English law students. So we invited her to come up and spend the day with us here in Prescott.

THE COURT: Welcome, Miss Cooper.

MR. HAMMOND: Thank you.

MR. SEARS: Your Honor, I have by my calculation six of the twelve pending motions that we think could be talked about today. As we said in chambers, these are matters which we don't think -- with the possible exception of Number 8 -- would require any testimony in this case and I had a particular order to them, but I did want to talk for a minute about -- on my list Motion Number 9.

Maybe it might make sense for the record -- if I could just give the Clerk this and have her mark this for the Court. Mr. Butner already has already received copies of this. This is our list of pending motions.

THE COURT: Can I -- if I direct it, can you just attach it to the minute entry that's made of today's proceedings instead of marking it as some kind of an exhibit?

THE CLERK: Yes.

THE COURT: I would appreciate it doing it that way instead of taking more numbers of -- more exhibit numbers.

MR. SEARS: Thank you, Your Honor. Number 9 and Number 6 on our list, the 404(B) motion and the motion related to photographs in this case. We had proposed setting those for hearings. We had asked and the State had, I think, agreed in their response that the Court conduct an in camera inspection of the photographs and we have proposed Friday and you had said in chambers now that you have half a day for us on Friday.

THE COURT: Right.

MR. SEARS: Is that right?

THE COURT: Yes.

MR. SEARS: Thank you. And I'm not certain we're going to do but what I suggested in our reply was that the State simply bring to Court those photographs of the particular subject matters that I had listed; the autopsy, the postmortem photographing of the body with the golf club that the Court has seen, the crime scene photographs that depict the victim at the scene, and then the photographs relating to the work of Dr. Fulginiti, the State's forensic anthropologist that we believe are difficult photos as well, and that we could then conduct an on-the-record hearing in camera to do those and it

might be something that we could do in a locked courtroom with the photographs, perhaps even projecting them on the wall here. We could be sure that the courtroom was locked for that purpose.

I have personally done that in a number of other cases and I think that it's a very important motion. It's also time to do that. The State has had these photographs in their possession since the very beginning of this case and I think that they know what they are and we certainly know what they are.

THE COURT: I expect decisions have been made about what probably you would anticipate wanting to use at trial. Are they in a coherent package that we can have them brought?

MR. BUTNER: I can put them in such a package, Judge. I haven't done that. I don't know about the idea of a locked courtroom. I don't know that that's such an excellent idea. I understand Mr. Sears' concern. We're not trying to sensationalize this. I had anticipated that this would be a review basically done in chambers or something like that. I guess, I just --

THE COURT: Well, that's what in camera means.

MR. BUTNER: It does. I just object to locked courtrooms. I think that's a bad idea in general.

MR. SEARS: I was simply trying to use the

facilities. I have --

THE COURT: You're familiar with the space that I have back there and the lack of place particularly to show it as distinguished from in the courtroom.

MR. SEARS: And I have -- the last time that I did this was in Federal Court in 2003 and we did it in the courtroom using their, at the time, state-of-the-art projection equipment, and we tried to be very careful in making the record on that and the government came in with about 300 photographs and the Judge eventually agreed to, I think, 29 photographs, many of which had to be cropped and edited. And so what's difficult is particularly if we're all standing around your desk looking at these things and you say, well, I don't want this over here, and that, it's very difficult to do that. I find it's much easier to have them there.

Having said that, the reason to do it in chambers would be because of the nature of the photographs, and I'm simply saying that if we considered this -- this room, if the door were locked, and an in camera inspection, it just makes it logistically easier to go over many, many photographs at the time so that the record is very clear and we're not making mistakes.

THE COURT: Well, I'll direct that you put them in a package so I can review them on Friday which is

what both sides agreed to, Mr. Butner, and I'll cross the bridge of how we cover those depending on what format they're in at the time you make the presentation, I presume that they are all printed out and available in that fashion.

MR. SEARS: I would anticipate, though, that at some point they would be on a CD and available to be displayed. If they're not on a CD -- that's how we received them and rather than, again, going through 8 and a half by 11 photographs, you know, in color it's much easier to project them instead of looking at them.

THE COURT: If they're on CD that would be easily to review.

MR. SEARS: And that would be my request. I would imagine the State has them in that format.

THE COURT: Mr. Butner, do you know if they're in that format or not?

MR. BUTNER: Judge, I don't know if they're in that format. I'm going to have to get with somebody to check on that it. Maybe that would be the easier way to do it if we can get it that way, you know. I guess one CD of all of these photos but I don't know if I can do that and, obviously, everything takes time. I'm going to have to kind of figure out how to get it together that way.

THE COURT: I agree with both sides that would

probably be the easiest way to review them all. So if we can get them in that fashion, that would be my preference, if you can't, I'll live with the difference.

MR. SEARS: The photographs that we have received in disclosure have discreet numbers assigned to them and, again, for purposes of clarity --

THE COURT: Bates numbers or Bates style numbers?

MR. SEARS: No. Each image has a -- typically a four digit number attached to it that often corresponds to what's in the camera.

THE COURT: Is that a sheriff's number or --

MR. SEARS: Well --

THE COURT: -- your number?

MR. SEARS: We don't know for a fact. It's not our number.

THE COURT: It's not your number?

MR. SEARS: We know it's not our number. It's numbers that were assigned to them and what happened was -- the way it was disclosed to us is that we would get a CD. The CD would have typically a two letter designation. They went through the alphabet once and then they went through it again and did that. They're up to over 200 now but on the CDs there would be a description of the photograph and then typically a log would be disclosed to

us that's a handwritten log prepared by the photographer saying 40-311 is so and so, taken by so and so.

In this particular case there's going to be a lot of different photographers because different -- these events occurred on different dates. So there's the crime scene photographs, there's the autopsy photographs, there's the two weeks after death series of photographs, and then there are the photographs taken by the anthropologist in Tucson in this case which we think are subject to this motion.

And I think that we can -- I am certain that when the State puts together this compilation of photographs that they want to offer, that each of these photographs will have numbers. I'm sure it's going to be difficult for them to strip those numbers off of them and put them on the CD. So I would encourage them to retain those numbers so that when we make the record we're identifying photos by a mutually agreed upon set of identifying numbers.

THE COURT: All right. Thank you. So we'll plan on that for Friday and because I need to hear more about Rule 404(B) the motion, the response, and what I ought to set, if anything, with regard to that.

MR. BUTNER: Judge -- excuse me -- before we get off on the photos --

THE COURT: Okay.

MR. BUTNER: I've been conferring here with my assistant here.

THE COURT: You can stay seated, Mr. Butner.

MR. BUTNER: Oh, thank you.

THE COURT: If you wish.

MR. BUTNER: I just want to stand up for a minute.

THE COURT: Good.

MR. BUTNER: In regard to the photos, I'm not sure that they're -- that each photo has its own separate number. There may be some duplication of the numbers. Apparently the photos are numbered by the camera when they're taken. And, in fact, I've had somebody working on cataloging these photos with those numbers for quite sometime. It's been kind of a gargantuan undertaking, actually.

So we won't cut off the numbers on the photos. We will do the best that we can in regard to the numbers on the photos and, again, we'll do the best that we can in regard to putting the photos on a CD so that we can just use them that way, but that's going to be, you know, that's kind of double cataloging them, so to speak.

I mean, to go through the photos and then, you know, pull them from the various CDs because there's

numerous CDs of photos and then put them on one CD, and I don't even know if we have that capability in our office, so --

THE COURT: Any idea of the kind of numbers of photos that fit within these categories that you're intending to use at trial? Is it up to 200 or that many?

MR. BUTNER: I'm not going to want to use that many photos at trial but in terms of the number of photos to go through, and I haven't done it yet, there's -- there's probably a thousand.

THE COURT: But you're not intending to use a thousand at the trial?

MR. BUTNER: No, I'm not.

THE COURT: We need to figure out which ones are actually going to be used and then make a determination from that.

MR. BUTNER: Right. I understand. And usually when we do -- my experience when I've done this process is I will get a group of photos but I will have some alternatives so that, you know, we can hopefully agree upon the appropriate photo that depicts the appropriate type of image and it's the least gruesome of the bunch from everybody's point of view, so to speak. So --

THE COURT: Okay.

MR. BUTNER: -- you know, that, generally speaking, requires more than one photo for each particular item to be depicted.

THE COURT: I understand. I follow that.

MR. BUTNER: Okay.

MR. SEARS: Judge.

THE COURT: Mr. Sears.

MR. SEARS: The State's response just now calls to mind a concern that we have had for many months. This date was set in May. This date has been on the calendar event for nearly eight months. Everyone understood, I thought, that this was a time when we would make serious efforts towards understanding and focusing and refining and perhaps limiting the evidence that would come in at trial.

For the State to stand here today and say twice already that they're simply doing the best they can, that they haven't reviewed the photographs, that they're not ready to proceed, that they don't have these organized, is the problem that we have been trying to bring to the Court's attention for months now.

This is the time to do it. You have told us, Your Honor, under no uncertain times, the last several time that we've been here, that you do not have another week for us to do this again between now and May 4th. We

have filed these motions. Virtually all of the motions that are up for consideration this week are just that, they are motions aimed at putting the State on notice about what their evidence may be and what their evidence may not be.

And I thought, apparently incorrectly, that this would be something that the State would have long ago done, that they would have begun to organize the photographs, they would have begun to select the photographs that they would use. Their disclosure obligation continues in this case. This motion has been filed for a number of weeks now. We are ready to go this week on these issues. The State needs to be as ready as we are in this case.

To say, again, that they are simply doing the best we can in a capital case that has been pending all of these months is, in our view, Your Honor, is unacceptable. And it maybe the tone of these hearings, from the State's perspective, and that is very, very troubling to us and we need to get this important work done. There is a huge amount of work yet to be done between now and the time of trial. We will be ready for trial, Your Honor, but we can only be ready for trial if the State is ready.

If the State continues to behave in the manner they've behaved, then I don't know what will happen in

this case, but we are certainly not going to ask this Court for more time while our client sits in jail. It's just not something that we intend to do.

So I encourage the Court to keep the State on track here and to not allow them continuously, as they've just done, to say that it's a work in progress. It's a big job. It's monumental. There are a lot of pictures. We're doing the best we can. None of that, Your Honor, we submit is acceptable.

MR. BUTNER: Judge, if I might.

THE COURT: You may.

MR. BUTNER: Mr. Sears and the defense have attempted to dictate the schedule of these things all along and I don't think that that's appropriate in this case. We will be ready at the time of the hearing.

This morning about 15 minutes ago is the first time that we got notice of exactly what the order was going to be. I'm still not clear on the order, quite frankly, and I don't think that it's appropriate for Mr. Sears to stand before the Court and be chastising the State when we just found out about the order of these motions. That was a big question in my mind when I got here, well, what order are we going to be handling this in?

There are some motions that are before the

Court that are susceptible to dealing with them right now just in the ordinary course of business. There are some motions that take some preparation, the 404(B) is another example, in addition to the gruesome photographs motion.

I didn't know that Mr. Sears or the Court would want an evidentiary hearing today or this week on those issues and I don't have any witnesses subpoenaed. Why is that? Well, I didn't know when to have them subpoenaed for one reason. And I will endeavor to be prepared at every point in time during this week for the appropriate hearing, but I need to know when those hearings are too.

So I don't think we need to start off on the kind of foot that apparently we have started off on in terms of making attacks against each other.

MR. SEARS: If I might, Your Honor, on 404(B).

THE COURT: Yes, sir.

MR. SEARS: Let me see if I can put the 404(B) issue in some context, Your Honor. Rule 15.1, Your Honor, requires the State --

THE COURT: You don't need to do that right now. My thought is that you're scheduled for having it on Thursday probably is a good schedule and so --

MR. SEARS: Let me tell you what we're willing to do.

THE COURT: -- to the extent that either side wants to put on that kind of evidence, I think they should subpoena their witnesses for Thursday.

MR. SEARS: All right. This is the way we approached it, Your Honor. If the State wants to use 404(B), other act evidence, the State has to disclose it. The State's not disclosed it, but if we were willing to treat the State's response to our motion as some sort of disclosure in this case, the burden is unmistakably on the State to go forward with that evidence.

They have to prove to your satisfaction by clear and convincing evidence that the acts occurred. They have to then show why those acts are not subject to preclusion under 404(B), which of the exceptions to 404(B) they would fit into.

They then have to demonstrate at the same hearing relevancy and whether or not 403 balancing prejudicial affect versus probative value exists in the case. That's what we contemplate the hearing being in this case.

THE COURT: Frankly, that was my main concern with asking you all in is to make sure that we had the witnesses lined up for doing that and my preference, obviously, is for this week as distinguished from some other time.

So that in particular is the motion because of those things that you mentioned and the need for the Court to make those kind of findings that I asked you in, and I presumed that I could prevail on everyone and to be ready for that by Thursday or Friday, but later this week as distinguished from next month because I don't have any time -- as you said, I don't have any time next month as things currently stand on my calendar. I have a nine day trial that starts on the 4th of February.

MR. SEARS: To be clear here, Your Honor, when we filed our motion our belief was that the State did not have and would not attempt to present any 404(B) evidence because they had not disclosed any and the purpose of our motion in limine was really to shut that door forever.

The State has responded and said, oh, I suppose we'd like to present evidence of a laundry list of things. It might be efficient sometime either today or tomorrow to take up some of those matters to see whether the State can make a proffer here today before the evidentiary hearing begins on Thursday that would even remotely suggest that some of these matters would properly be 404(B) evidence. Some sort of threshold showing that they could under some stretch of the imagination ever be admissible against Mr. DeMocker at trial in this case.

I think that might be useful and I think that

process might widdle down their wish list of circumstances significantly but we're prepared to defend on Thursday notwithstanding the fact that we really haven't gotten the disclosure that we would otherwise be entitled to with these acts.

If you look at Rule 15.1 that corresponds to 404(B), the rules of evidence, it really contemplates disclosure so that the Defendant doesn't walk into a hearing with no idea what the State's evidence would be on certain matters but we want to get this done. We don't want to do this two days before trial. We don't want to do this in the middle of trial. We want the State to bring this forth now and let the Court rule so that we know what the trail will look like.

THE COURT: Mr. Butner.

MR. BUTNER: Well, Judge, you know, we talked about in this 404(B) motion, and I don't know if we're going to argue it now, but the defense filed a motion setting forth 11 specific categories and stating that basically we had presented them with evidence of those kinds of acts in those 11 specific areas, and that's exactly right.

We have done that. And we would plan on proceeding with that kind of evidence once we've had a 404(B) hearing to see if we can put it in at trial but,

Judge, we haven't got witnesses subpoenaed and some of these witnesses may not be available.

This is the first time that I've heard we're going to have a hearing on a 404(B) evidentiary hearing on those things. And I realize that, okay, that trial date in May looms relatively closely but we still have a substantial amount of time between now and then.

The State is not prepared at this time, and I don't know that we can be prepared this week to present all of those witnesses concerning 404(B). I mean, I'll certainly do the best that I can if directed to do so by the Court but we're getting the bum's rush here from the defense on this issue, and like I said, we started off this morning just hearing about the order of the motions, not even knowing before that that we might actually have a hearing on 404(B) issues.

THE COURT: Well, a hearing is necessary on 404(B) issues.

MR. BUTNER: That's correct, Judge, it is.

THE COURT: Disclosure is necessary. Hearing is necessary. The Court's findings are necessary.

MR. BUTNER: It is, but I didn't know we were going to have to a hearing until we got here today.

THE COURT: Well, this is the week that was scheduled for those hearings and this is the, you know,

the motion itself pertaining to that issue was filed in December, so I was hoping that every one would be working together to prepare and have motions ready for hearing this week.

MR. SEARS: We're ready, Your Honor.

THE COURT: Well, what do you wish to take up first in terms of today's matters?

MR. SEARS: Thank you, Your Honor. What I'd like to talk about first is Number 12 on our list which is our Motion for Re-examination of Mr. DeMocker's Conditions of Release.

Your Honor, I recognize that we have -- this is the third time that we have been to you asking for modification but this motion is directly related to the way in which the last motion was resolved.

One of the circumstances that we alleged as a basis for a re-examination of Mr. DeMocker's release conditions had to do with what has become an extraordinarily serious problem inside the jail with his access to his own case materials.

Just to review, Your Honor, the written discovery from the State is ongoing. We received the 44th supplemental disclosure from the State on Friday. Mr. DeMocker has had no access to his written discovery, just the basic discovery, since the 22nd supplemental

disclosure. So we're at the midpoint. The Bates numbering system now, I believe -- and Miss Galon (phonetic) or somebody else might correct me, but I believe, we are now over 16,500 pages of documents.

In addition, there are more than 17,000 pages of documents not Bates labeled. There are more than 200 CDs that contain documents, audio files, and video files that are in addition to the written discovery, and then there are all of the defense initiated defense materials that Mr. DeMocker needs to have and should have access to.

I think at the last hearing I had provided the Court with my own estimation of how much paper that is, that in an typical bankers box -- that the Court I'm sure is familiar with -- you can get -- depending on how tightly you pack them, something between 1500 and 2000 pages of documents.

So if you would extrapolate from these numbers and you say -- just to round it off -- that there are 35,000 pages of documents -- the Court can do the math -- and say that that's probably about 20 bankers box worth of printed documents that has -- that's only the paper discovery, the audio files, the hundreds now of hours of recorded jail calls in this case, all of the audio files, all the rest of those things are not susceptible of being reduced to print. If they were, then the number of

printed documents would grow geometrically. We would be in the hundreds of thousands of pages of documents by that time.

The defense team in this case is geographically diverse and their ability to communicate with Mr. DeMocker in the jail is extraordinarily limited. Even my ability to talk to Mr. DeMocker is limited to either phone calls, which in a maddening way cut themselves off after about -- after less than 15 minutes. You get a series of recorded messages. So when I have to talk to Mr. DeMocker at length, he's constantly hanging up and redialing.

When Mr. DeMocker makes those phone calls, he's in the dorm. He's not in a room with a private phone. He will frequently have to get people to turn the television down. He has absolutely no privacy. He doesn't have any of his documents with him.

The jail has told him that -- and they came and took his documents away -- that he could have whatever fits in one of these plastic tubs that they have, that would be the maximum number of documents that he has. I can't relate a plastic tub to a bankers box, maybe it's one or two bankers boxes in a tub.

Mr. DeMocker is not permitted to bring anything with him from the jail to Court. He's not

permitted to bring any of his notes, any of his documents. When I give him things here, it's a burden on the detention officers who are here just doing their job. Every time I give Mr. DeMocker a hand full of pages, it requires them to review those, to look at them carefully to see what they are.

Mr. DeMocker has been throughout his incarceration completely unable to listen to any audio files. If there is a meeting with Mr. DeMocker in which we ask for a contact room, Mr. DeMocker is strip-searched after that meeting. The last count I had, was many months ago, and it was up over 75 strip-searches of a man who is presumed innocent in this case. It is virtually impossible for the members of our team to meet with Mr. DeMocker in any meaningful way.

In response to that the State made a number of assertions in writing and during the hearing that was conducted on our last release motion about what the jail would do. And, in essence, this was based on some discussions that I had with Mr. Butner that the jail would be willing to allow Mr. DeMocker to have access to a computer which now would have to have some sort of additional storage device to contain all of what I've described here and the ability to listen to audio files and to look at video files -- he would have a place in

the jail to do that, at least eight hours a day.

Now given the delay in doing this, that would have to be every day, that he would have a secured telephone in that place so that when he had access to his materials, he could talk with us in a way that's different than the way he is talking to me now.

Mr. Butner has told the Court that this was a slow process but that he was making progress. I hesitate to say this but, essentially, their response to this motion is, we're doing the best we can and this is a slow process.

I attached to my motion my correspondence to Mr. Butner where I was very specific about what we were talking about. As I stand here today on January 12th, 2010, I do not have a response from Mr. Butner and his written response to the Court offers absolutely no additional specific information.

I believe that Mr. DeMocker's constitutional rights to an effective assistance of counsel and the ability to assist in his own case secured by the Sixth Amendment have been and continue to be violated by this circumstance.

The only way, Your Honor, that we can see that Mr. DeMocker can try to get back up to speed and meaningfully participate in his case is be out of the

Yavapai County Jail. We have proposed to the Court very careful and very detailed circumstances that would guarantee his appearance, would answer, we think, completely any question of whether Mr. DeMocker is a flight risk in this case but would allow him over the last four months running up to his trial in this capital case meaningful access to his materials and the ability to assist us.

There is no one that knows this case better than Mr. DeMocker. Mr. DeMocker knows his own finances. He knows every single allegation against him but our ability to work with him and his ability to work with us has been hampered here.

If the State stands up now in response to what I've just said and says, we're working on it, we're doing this, anything other than, yes, we will do this, we will do it tomorrow, you can do this, and we'll enumerate and promise to the Court that all of these things will happen, anything short of that, Your Honor, is just a continuation of the approach that the State has taken, the sheriff's office has taken, is we're working on it, we're looking at it, we're thinking about it, we're doing the best we can.

We are way too close to trial in this case to wait another day to get this done. This is as an

important circumstance to us as to Mr. DeMocker as we can imagine. The thought of Mr. DeMocker going to trial under these circumstances, knowing almost nothing about the State's evidence over the last seven months now against him and being held essentially incommunicado and unable to communicate with his defense team, is a constitutional violation of the highest magnitude, and we are frustrated beyond imagination, Your Honor, at this situation.

And at this point I personally don't care whether it is the county attorney's office or the sheriff's office or some combination of the two of them that is responsibile for this delay. This has to be resolved and it has to be resolved now.

We can't see another way for, Your Honor, that has Mr. DeMocker staying in jail, unless Mr. Butner is prepared to assure us today on the record exactly what the State will do and what the jail will do and nothing else. Thank you.

THE COURT: Mr. Butner.

MR. BUTNER: Judge, I'm looking at Mr. Sears' letter of December the 2nd, 2009, and I think the Court probably has already looked at it, and what I had told Mr. Sears sometime ago was that, I believe, that the jail could provide Mr. DeMocker with a computer and a place in the jail where he could work on his disclosure, examine

all of the materials and so forth, and then also a secured telephone line so that he could communicate with counsel and even experts on the same line from time to time.

And, I mean, when I say from time to time, I think that that would be on a regular basis, maybe as often as every day, I'm not sure about that, but I got this letter which talks about a whole bunch of other things; password protection for the computer, headphones to listen, an external storage device, private space within the jail that has a power outlet, Mr. DeMocker be given access to a private and secured telephone line to communicate for at least four hours per day, perhaps even a cell phone could be used, and then he may also have to have access to printed materials and photographs and then, of course, he would have to bring his laptop with him.

I tried to talk with Mr. Sears about this a couple of weeks ago and Mr. Sears and I are no longer talking. I have to communicate with Mr. Sears in writing. The computer is awaiting Mr. --

THE COURT: Before you move on, whose choice is that?

MR. BUTNER: Mr. Sears.

THE COURT: Go ahead.

MR. BUTNER: The computer is awaiting Mr. DeMocker, so to speak, in the jail. They can take him

to a room that has a private plug and he will be alone there to deal with his discovery materials. I've been informed that this can be done eight hours per day, possibly even longer.

Secured telephone, he's not going to get a secured telephone line in that specific place. They have normal kinds of places set up for inmates to communicate with their attorneys. They can even do it by way of video, and I've told Mr. Sears that a long time ago, and Mr. DeMocker would be able to do that.

Mr. DeMocker would also be able to communicate with his attorney or attorneys on a telephone line, and although this is very much out of the ordinary, I was informed by the jail that if he needed to talk with experts, that the attorney could arrange for a conference call to plug in the expert on that line and so they could all talk together, that's available now, and that's the State's response.

THE COURT: Thank you.

Mr. Sears.

MR. SEARS: When Mr. Butner tried to speak with me a week ago yesterday about this I asked him to put these matters in writing for just this reason.

Today for the first time, despite my letter of December 2, 2009, to him with these specific requests,

this is the very first moment that Mr. Butner has communicated to us and any one on the defense team any of this information. This has never been communicated before.

Mr. Butner has not yet explained what computer we're talking about. Is it a computer that we provide with the materials on it? That's why we had talked about a computer that was password protected. We were not adding additional requirements to be difficult. We were trying to anticipate issues in advance of this discussion.

Headphones make sense because there is a matter of privacy for these calls. The headphones plug into the computer. They are easy to store. We still don't understand from what Mr. Butner has said how these materials will get on this computer unless we provide the computer with materials on them and update them. We're willing to do that.

If Mr. Butner's suggesting that, for example, we gave Mr. DeMocker an array of CDs to play, the jail won't let him have those CDs. There's no place in the jail to keep those. They're not private and they're not secured, and that's why we talk about a simple password inscription for the computer so that everyone, including Mr. DeMocker, would feel comfortable that these materials are for his eyes and his eyes only.

The idea that Mr. DeMocker would not have access to a telephone in the place where the computer is is a problem because in a conference with experts or with us or with our staff or investigators it is critical that Mr. DeMocker have access to what we're talking about.

It makes sense in the simplest case, in the simplest case, when you're talking to your client and there is a photograph or document you want to be able to show your client the photograph or the document. Having access to a phone near the computer only makes sense. That's the way it would work. If Mr. DeMocker needed to look at Bates 1485 to see what that was, Mr. DeMocker could do it. Otherwise every time we go to see Mr. DeMocker we have to bring all of the discovery in the case with us. In addition, the discovery in this case is cumulative.

It's not appropriate for Mr. DeMocker to only have access to bits and pieces of it. All of it is interrelated. It's all about the same sort of events. The same source of conduct. So what's in the 44th supplemental disclosure relates to everything that has gone forward with the 43 supplemental disclosures before that, not to mention the work that we have generated in this case.

I proposed a cell phone because I thought that

was something that could be done that would resolve -- perhaps if there's a cell phone signal deep inside the jail there -- the question of where the telephone was and how to get the telephone into the room where Mr. DeMocker and the computer were, that was all that was designed to do.

I talked to, Your Honor, about this video conferencing system and I think that you indicated that you had some familiarity with it. It is anything but secured. It can only be used in 30 minute blocks on a schedule that is coordinated between the jail and the public defender's office. I have used it.

Mr. DeMocker -- the video conferencing system, unless they have changed it in the last year, would require Mr. DeMocker to be taken to a room off of the old courtroom in the jail that is not sound proof, has a window in it.

You might remember, Your Honor, that I said that one of the few times that I tried to use it at the beginning of the case I said something in my normal speaking voice and while I was there I could see the detention officer in the back snap his head around and look directly at Mr. DeMocker in the room. So I know based on that simple exercise that that is not a secure facility.

Taking Mr. DeMocker to some unspecified place to make phone calls where inmates make phone calls, is what I just told you, is from the phones inside his dorm with 30 some other inmates around ready to use the phone. Mr. DeMocker can't use that phone for four hours at a time and survive inside the jail. Mr. DeMocker doesn't have his materials there. It's not private. It's not secure.

So despite the State's insistence that they have solved this problem, they really haven't. They really haven't. And today I submit is the day that we need to decide whether this is enough or whether something else should be done. And I am dismayed that Mr. Butner's suggesting that somehow this situation is due to some lack of some communication on our part. It's a simple matter. If you have specific information, put it in writing. If you don't want to send it to me, file it with the Court, just tell us what the circumstance is.

In addition -- in addition, Mr. Butner has made promises in this case in writing and in Court that have not yet been kept and to say today that this is ready to go and this could happen is disingenuous, Your Honor. It's not likely.

I think if we took a recess and went over to the Camp Verde Jail and said, where's the computer, where's the phone, where's the room, it wouldn't be there

and wouldn't have happened.

I had proposed to Mr. Butner that we meet with the administration of the jail. Mr. Butner told me that that was not necessary, that this could be done. I, frankly, don't believe this is any where close to happening, nor do I believe even if it were ready today that it's any where near sufficient to guarantee Mr. DeMocker his constitutional right to his own case materials and to meaningfully assistance his counsel in his defense in this most serious of cases.

THE COURT: Mr. Butner.

MR. BUTNER: Jail Commander Russell informed me that they have the computer. It is a computer that the county had. It was one of the computers that the county was using. It's a clean computer, so to speak. They have been in possession of that for a little while now, indicated that Mr. DeMocker can be taken to this room in the jail where he could, as I stated earlier, work on his materials for at least eight hours a day and it may be longer than that, Judge.

And I guess I didn't directly address the CDs discussion but that's my understanding that Mr. DeMocker can be provided with these CDs by his defense team and he can review these CDs of the disclosure materials with the computer in the jail, that would be whole point of all of

that.

The telephone, no. They're not going to give him his own telephone in that private cell while he works on his disclosure materials. He will have access to the secure telephone system to communicate with his lawyers as I've previously described. Thank you.

THE COURT: And what are the limitations on the time with regard to that?

MR. BUTNER: I don't know about the limitations on time, Judge. I really don't. I'd have to inquire further about that. I'm pretty sure he won't be able to be on the phone for four hours at a time discussing things with his defense attorneys. That's, you know, generally not permitted in the jail as I understand it.

THE COURT: What -- do you know what is, though --

MR. BUTNER: I really don't.

THE COURT: -- one or two hours?

MR. BUTNER: I really don't know. I have to inquire further about that and I will do that.

THE COURT: What is the issue, if there is an issue, with regard to a computer and if necessary an external hard drive that Mr. Sears and the defense would provide for Mr. DeMocker's use?

MR. BUTNER: I don't think that -- first of all, it's a big exception for the jail to have this kind of situation with a computer in the first place. I don't think that they want any kind of external computers brought into the jail.

I think they want to have a computer that they are able to examine, so to speak, and make sure that nothing has been broken off of it or could be used in any other fashion other than for the purposes which the computer would be used for.

THE COURT: If he's subject to intimate searches coming and going from the particular room, what's the security issue?

MR. BUTNER: Judge, I don't really know, and I don't know if he's subject to those kinds of searches coming and going from the room. I think that he will never leave the confines of the jail. They have a special room set up for him to use for this. I think that's basically the situation.

THE COURT: Thank you.

MR. BUTNER: And also in regard to his -- just to clarify too, in regard to his written materials, it's my understand that he would be able to have access to those written materials along with the computer and the CDs if necessary.

THE COURT: Mr. Sears.

MR. SEARS: Here we are again, the jail has said that Mr. DeMocker may have what amounts to a few thousand or less pages of his discovery at a time.

The jail has not made any offer whatsoever -- because I know they won't and I know they can't -- to store his other documents and essentially act as Mr. DeMocker's librarian and say I need the following documents, nor would they be willing, I assume, to be the librarians for hundreds of CDs. We simply have --

THE COURT: Whereas if you have digital storage and that sort of thing, you can do one external, and do you think you can get everything that you need between the computer and the one external --

MR. SEARS: We --

THE COURT: -- where they wouldn't be having to store voluminous materials?

MR. BUTNER: Excuse me --

MR. SEARS: That is what we had in mind, Your Honor, but we also have to have access to that on a regular basis.

If the State is going to continue to disclose, as they apparently are, you know, on a weekly or biweekly basis, we'd have to have access to that to load the new materials into this computer but the point of this

is that it all works together.

Mr. DeMocker then has -- assuming somehow the jail would change their mind about this, Mr. DeMocker has a state-of-the-art computer with all the storage and his entire case on the computer.

THE COURT: And, therefore, access to audio and video?

MR. SEARS: Audio, video.

THE COURT: Sure.

MR. SEARS: All of this information -- all of the privileged information that we would want him to have that we have generated in this case, that's step one, and I've not heard any suggestion that the jail is willing to do that, that the State's prepared today to say that the jail will do that.

Number 2, when he has that material, then Mr. DeMocker as he's working through it, has to have regular secure access to us. Mr. DeMocker just told me that the phones that Mr. Butner is talking about, the secure phones, are shared by 40 inmates and there are three phones and they are inside the dorm and no one inmate could conceivably, whether the jail had a rule or not, monopolize any one of those phones for very long.

I think the longest phone conversation I may have had with Mr. DeMocker might have been 30 or 40

minutes, measured by the number of times -- as we come down they give you a three minute, a two minute, a one minute, this call will be disconnected prompt, and I think our record is to get into the third such call, one right after the other, but even then, when I'm talking to Mr. DeMocker he is having -- I can hear him explaining to other inmates that he'll be off shortly, could you turn the television down, the phones are near the television there, and Mr. DeMocker would have none of his files.

So if I said to Mr. DeMocker over the phone let's take a look at these photographs, he doesn't have them. He wouldn't have them and he couldn't have them. That's the practical problem. That problem is multiplied by the inability of him to confer with experts and investigators who each have a particular area of expertise and would absolutely have to review materials. If they have materials to review, they need to review them with Mr. DeMocker.

You remember Mr. Curry, our financial fraud forensic accountant in this case, he has been given tens of thousands of documents now over the course of his engagement in this case to review and he has not yet been able to sit with Mr. DeMocker and ask Mr. DeMocker questions. The answers to which, I think, only Mr. DeMocker has, what was this about, what were you

thinking here, how did you handle this, what did you do when you got this request, that's absolutely critical work going forward in this case, if those matters remain at issue in this case.

All we have done, Your Honor, in my opinion, today is just move the ball forward a yard or two. We're less than four months from trial. I don't know if Mr. DeMocker's spent 20 hours a day, realistically, that he could actually listen to and look at every single thing in his case, but I do know that in the previous six months he has had zero ability to do that, and what he learns about the case is what I tell him, basically, and what he learns in Court and what I send him in letters, and that's the sum total of what Mr. DeMocker knows about the last half of disclosure in this case and the reason for that is the way in which he is being held at the county jail.

I will tell you personally that I think that not withstanding what Commander Russell and jail administration tell Mr. DeMocker, jail staff at the sergeant and D.O. level will say and do other things and Mr. DeMocker's day-to-day management is under their control and not directly under jail administration's control.

Whatever concerns you had, Your Honor, that caused you to set bond at the amount it is now and to deny

our two previous requests, whether it is Mr. DeMocker's flight risk or any of the other circumstances can be resolved. For example, if you are concerned, Your Honor, about just the idea that Mr. DeMocker being present in the community, given the nature of these charges, we would agree to virtual house arrest if Mr. DeMocker could simply be monitored electronically at one location.

And if you were uncomfortable with that location being here, we would have Mr. DeMocker in Phoenix near his lawyers and the rest of my team in Phoenix, if that was more appropriate for the safety and sensibilities of the community. It really doesn't matter to us.

What does matter to us in the most significant way possible is that Mr. DeMocker, the most significant piece of our resource base is of no use to us at this point under the circumstances. There is very little that we can do other than on an issue by issue basis ask him a question or two at a time in a phone call, that is about the limitation, or go over as I do, essentially every Friday, and spend a couple of hours with Mr. DeMocker trying to review the events of the week.

Even then if I want to sit with Mr. DeMocker in a room and show him the documents, Mr. DeMocker gets strip-searched at that point. And, you know, he's willing to do that and has submitted to that, as I said probably

now, probably 90 times, but I stopped doing that. I didn't want Mr. DeMocker to have to go through that indignity just to be able to sit in a room with his lawyer in this case.

Mr. DeMocker is subject to bond. Bond as we have pointed out is for the sole purpose of assuring his appearance at Court. As we have said before and will say again today it is inconceivable that Mr. DeMocker would run from this evidence and this case with what's at stake and what his running would do to his family, to his parents, to his children, to all of the people that love and care about him in this case, but having Mr. DeMocker out would make it possible at last for Mr. DeMocker to become part of his own defense. Thank you.

MR. BUTNER: Judge, to clarify, it's my understanding that the CDs would be kept there with the computer by the jail personnel and then be provided to Mr. DeMocker. Maybe I did not make that clear. So I think as Mr. Sears characterized it, I guess, they would sort of be his librarians in that regard.

Judge, it sounds to me like that, you know, this really is, again, another motion by the defense to get Mr. DeMocker out of jail and we're revisiting that and I don't think we should be doing that. As I stated the computer awaits and I would hope that we can resolve this.

THE COURT: I'm going to enter an order denying the request for modification of release but I will enter an order, Mr. Sears, with regard to affirming the Defendant's ability to assist in his own defense.

I'm going to require the -- and if the State can't do that, it violates the Defendant's Sixth Amendment right to counsel and participate, then I'll have to reconsider this, but I will order the Yavapai County Jail, the Yavapai County Sheriff to provide the Defendant with a secure room. The computer to be provided by the defense team with external hard drive and plug. The secure room has to have a power plug so that he can plug in and won't be dependent on battery power.

I'm putting no restrictions on the ability of the county sheriff's office to provide for the security of the facility in terms of they do whatever wanding or searching that they may normally and routinely do to assure the safety of this inmate and any other inmates in the Yavapai County Jail.

So I'm not restricting in any way their ability to do that but I think that the computer simply makes too much sense. A computer provided by the defense that's preloaded with the information that is already part of the record and disclosure with the Bates stamping and video clips and audio clips and photography.

Frankly, there shouldn't be that much more in the way of discovery that comes out. We're suppose to be progressing to the presentation of the case and I viewed this week as tuning that up so that we can all be ready to go by the time trial starts in May which has been pointed out is less than four months away.

So external hard drive is authorized and whatever wires that may be necessary to do that, and I'll authorize the Defendant to have up to eight hours a day -- or excuse me -- not up to, at least eight hours a day in this secure room for purposes of his review of these materials.

I guess I would like to know why he can't have a secured phone line in the room. So I'll order that if such a phone line be evaluated as to why we can't have it in this particular room or whether it's not wired for that, and what proposals you all may have for an alternative to that so that the access in particular to the financial expert and the defense attorneys with the Defendant, but the headset is necessary seems to me also to maintain privileged materials from being overheard and this, in essence, is no different than attorney-client correspondence. It's just in a digital form.

Would I enter such an order in a common case? I probably wouldn't, but we're dealing with a significant

case that's getting right up toward the trial time and I want the defense team to be able to be prepared to protect effective assistance of counsel, rights that the Defendant has.

So I'm not going to limit Mr. DeMocker and Mr. Sears to a county computer. I don't see any real claim for hazard to the security of the jail with regard to that. If the jail can search him to make a determination that he's not taking anything back to the dorm that shouldn't be taken back to the dorm. They can do what they want as far as security. If they don't want him to have the computer in the dorm for obvious reasons, they don't have to do that but he needs to have access for a significant time of each day, seven days a week, so that he can review the materials that are necessary to review to be prepared for the trial, and this may be password protected, Mr. Sears.

If you want to file a proposed formal order that's more specific that you can have served on the sheriff or Commander Russell, that's fine. I expect that with this, probably in lieu of printed materials, a computer would take up less space than the printed materials would, even with the additional devices that are required, and it wouldn't be necessary to have anybody acting has a librarian or accessing separate CDs and the

like. It can all be put on the external hard drive.

MR. SEARS: I think that's true, Your Honor. I had a couple of clarifying questions here.

THE COURT: Go ahead.

MR. SEARS: Would you please set a date for an answer from the sheriff's office about the secure phones so this matter, that part of it, doesn't drag on indefinitely.

THE COURT: Friday.

MR. SEARS: Thank you. And your reference to the password protection answered one of my other concerns about having access to this. As a practical matter I assume that the jail would not allow Mr. DeMocker to keep this in his cell?

THE COURT: I assume.

MR. SEARS: So there has to be someplace that it's kept but if it's password protected, then I'm not concerned. Although an external hard drive could be unplugged and looked at. I don't know enough about inscription to know if we can inscript what's on the hard drive but I think we probably can.

It's just -- there's going to be, in addition to public record stuff in here, a considerable amount of attorney-client privilege material that he should have in a privileged way. I appreciate the Court's willingness to

look at the password protection and we will have to find a way to do that.

We will also need access -- I will put this in the order -- we will need access periodically to update the computer with information as it comes in.

THE COURT: I don't have any issue with regard to that. I think you need access.

MR. SEARS: You're just going to have let us or whomever I bring with me that knows more than I do about this to -- which would be virtually anybody -- to update this information. We will do this as quickly as we possibly can.

THE COURT: Okay. Anything else on that that needs additional clarification?

MR. SEARS: Your Honor, I'm sorry, one more clarifying -- given the press for time we would ask that since every day in the jail is a working day that he be allowed access seven days a week. I can't think of a reason for him to have days off.

THE COURT: Yeah. And I think we can start this as soon as I sign the order and you have it served on the jail commander or Sheriff Waugh whichever you may choose. I think either one is appropriate. And --

MR. SEARS: Thank you.

THE COURT: And copy obviously -- actually,

what I would ask you to do is have Mr. Butner review it as to form before I even sign it so that any additional clarifying language can be addressed.

MR. SEARS: Thank you.

THE COURT: Which will be no later than Friday morning.

MR. SEARS: Yes, sir.

THE COURT: Okay. Let's take a break for the staff and you all. About 10 minutes. We'll resume at quarter to 11.

(Whereupon, a break was taken.)

THE COURT: Let the record reflect the presence of the Defendant. All counsel. We have about an hour -- a little bit more than that before lunch. Do you have anything that you might fit within that time?

MR. SEARS: I do, Your Honor. Mr. Hammond would like to speak to Number 5 the DNA related testimony motion here. If I could inquire as to what be known, if anything, about Detective Huante's availability that would help us.

THE COURT: Mr. Butner.

Mr. Butner: I don't know anything about Detective Huante's availability.

THE COURT: Okay.

Mr. Butner: I'll try and track him down

during the lunch hour, of course, but --

THE COURT: Okay. Thank you. I think Number 5 deals with a motion that was filed December 21st. I received a response from the State January 4th and a reply was filed on January 8th.

Mr. Hammond.

MR. HAMMOND: Good morning, again, Your Honor.

THE COURT: Good morning.

MR. HAMMOND: This is the motion that relates to all of the outstanding DNA related topics that we have spoken to the Court and to the State about on a number of occasions now.

And what we attempted to do here was to put in one place the catalog of ongoing concerns, and as we said lamentably at the beginning of this motion and at our reply, for reasons that should not exist today, we are still faced with a premature motion.

The motion is premature on several counts because the testing has not yet apparently been concluded, nor have the relevant DPS and Sorenson Laboratories witnesses been interviewed because they haven't completed their work, but having observed that problem, and I think we were all reminded of it at least on the defense side of the table this morning when you and Mr. Sears observed that the time for evidentiary hearings after this week may

be severely restricted.

We do anticipate that there will have to be some day before the trial of this case where we get down to the very nitty-gritty about what the State's DNA biological witnesses actually intend to testify to. So how we deal with that, I don't know. We have raised, I think, for now many months our concerns but let me deal with the ones that I think should be resolved by now and maybe we can work through them in a way that will end the concern about these things.

First, we've spent a fair amount of time, Your Honor, talking to you about one particular item of evidence that the Court will recall involved some destructive testing, the tank top worn by the victim. There have been numerous communications, most of them here in Court, about what was going to be done with that testing.

The state of matters as we have been advised of them are that the State has agreed that because the testing will be destructive of potential evidence that both -- both the defense consultants and the State's consultants need to be present. I don't think there is an issue on that point any longer, if there ever was.

We also now believe that the State has agreed that the testing will, in fact, be done at the

defense consultant's laboratory, that laboratory is in North Phoenix at the Chromosomal Laboratories. We have said and made clear that that laboratory is prepared to allow DPS or Sorenson to have an observer present.

So we believe all of the basic building blocks are in place, but we have not yet been told when we will get the evidence, who will be present. I think that's just a matter of the State instructing that that be done and be done promptly. At least if we do that, we can take care of this one item, and I can go into more detail on it but I hope that's not necessary. I think that what we already have is that at least of an assumption in this Court that this will happen. It simply has not happened yet. So that's point Number 1.

I regard that as hopefully a logistical matter that we can have an appropriate order entered today and have that done in the next few days. Our laboratory stands ready any day. Miss Chapman and I went out last week and met with the people at our laboratory and they said, you just tell us when and we'll be ready.

The second related matter that the Court is aware of that is contained in our motion, the Court has heard on several occasions that there are 14 or 15 other items that have recently been identified by the State for additional DNA examination.

We now have been -- in the most recent disclosure been given what we believe is a list of those items. There are chain of custody documents that tell us that those items have been transferred to a laboratory. We believe that at least some of that list of items has been examined.

We believe, although we haven't been informed in the way that I think the Court expected, that the testing is negative, that there is no biological product on some of the items, and on some other items the only biological product belongs to the victim, but obviously given the importance of getting to the end point on discovery in this case, we believe that it's critical that we have confirmation that that is where they are and that we have the records that demonstrate that.

We are particularly concerned about a couple of those items that quite plainly do contain some significant biological evidence. Any observer can tell that they do. There is a piece of molding that I think the Court has heard about that contains a great deal of blood and hair.

So there are things that we know are not going to be absent of biological evidence that we need to know what the results are and we need to know, not just what the bottom line is, but what procedures were used,

what examination was done, so that if we think further work needs to be done, we can do it, but for reasons unknown to us, that has not been -- at least has not been completed yet. So those two items, the tank top and the list of unfinished items are near the top of our list.

There are two other areas, Your Honor, that are talked about in our motion that we think ought to be readdressed this morning. The first relates to Item 603. 603 is, I think we all now know, is the biological evidence found underneath the fingernail or fingernails of one hand of the victim.

We have asked for all of the evidence that the State has with respect to that biological evidence and we believe from what we have been told so far that it is unquestionably true, unquestionably true, that there is DNA taken from a fingernail or fingernails of the victim's hand. It is male DNA. There is a substantial quantity of DNA, indeed quantity sufficient to provide a full DNA profile. We know that that DNA does not belong to Steve DeMocker, that DNA has not yet been, insofar as we know, matched to any individual in any database or in any of the buckle swabs taken by the State.

So, that, we believe is the State of the evidence and, A, that needs to be confirmed so that we do not have any further questions about that evidence but as

we pointed out in our motion there is a closely related consideration with respect to that particular evidence.

The suggestion has been made by the State on various occasions that possibly one of its witnesses might want to get on the stand here in this courtroom at the time of trial and advise the jury that that DNA under that fingernail could have gotten there by incidental contact, that it could have gotten there by the failure of the medical examiner's office to use uncontaminated clippers when the nails were clipped.

We think that it is self-evident that that is not a reasonable possibility. It may, in fact, take further testimony to confirm that in some pretrial hearing, but I think that the Court can understand why efforts to minimize or dismiss that evidence on the grounds that, well, it could have been incidental contact or what people call touch DNA, mere idle contact, is not the case here, given both the volume, the location of that DNA.

If the State does intend to continue to suggest that its witnesses may try to dismiss this evidence on that ground, we very much need to have whatever evidentiary presentation is necessary to satisfy the Court that any such testimony would violate Rule 403 and Mr. DeMocker's constitutional rights.

This is what happens in DNA cases. This is what happens when there is obviously relevant and important DNA evidence that is inconsistent with the prosecution's theory. Quite often witnesses will get on the stand and will say, well, that DNA could have gotten there from a lot of innocent sources, maybe we weren't as careful as we should have been when we did the autopsy.

It is exactly that kind of post-talk rationalization that we want to be absolutely sure cannot happen here. We believe that the State's own expert in the laboratories here will agree that that wouldn't have happened. You wouldn't get this kind of profile with this volume if it had been an incidental or accidental touched DNA but that issue is one of great importance to us and sadly it remains unresolved.

Finally, there is a broader category of other DNA that the Court I know is aware of from light bulbs in the house, from the door handle, where the profiles are not as complete as the DNA profile on the fingernail and there will be -- unless we resolve it carefully before trial, we anticipate that there will be attempts by State witnesses to dismiss that DNA as well and to say, well, the DNA on the light bulbs or the DNA on the doorknob is inconclusive. It is consistent with any variety of things but what they will not want to concede is that, in fact,

that DNA is not Steve DeMocker's DNA.

And we believe that honorable experts will know that it is not his DNA and that -- and that they cannot so testify. For reasons that I do not understand, Your Honor, the State treats this part of our argument as ludicrous. The word they used in their response. It is anything but ludicrous. It is critically important that we anticipate in advance of trial what the DPS and Sorenson people intend to testify about that other DNA in this home.

The fact remains that at the end of the day, and we have said many times, that they should do all of the testing that they want to do consistent with, as Mr. Sears said this morning, with us being able to get this case to trial but at the end of the day we believe that they have to be prepared to say, what I believe their reports will say, that they can draw no conclusion that would suggest in any way that that DNA belongs to Steve DeMocker.

And we know from the grand jury transcripts and both of the grand jury appearances that there are witnesses who would like to be able to minimize the exculpatory contend of that DNA by saying, well, it's just inconclusive which suggestions in the minds of lots of people. Well, inconclusive means that it could be Steve

DeMocker when, in fact, the experts know that it is not.

And we have anticipated that at some point it might require an evidentiary hearing in your presence and out of the presence of the jury to actually put up the electropherogram so that the Court can see on a screen why it is not reasonably possible to conclude that this DNA belongs to this gentleman. So those are the four issues that are most concern to us with respect to DNA. Thank you.

THE COURT: Thank you. I guess my question, or maybe it's more of a comment, you don't know at this point what the State's expert will say because they have not concluded and, therefore, you have not done the interview yet?

MR. HAMMOND: We have not interviewed any of them but we also pointed out that experience has taught us that we -- that we cannot rely comfortably on just the reports because DPS experts -- and this is an issue across the State of Arizona -- sometimes tend to say, well, my report says one thing but when I testify, I testify as an expert and I can testify about things that go beyond the four corners of my report.

So it's very important for us that these people be interviewed and that if they are going to try to testify beyond the four corners of their reports, that we

know it in advance of trial and can file appropriate motions on that question.

THE COURT: Okay. Thank you. Mr. Butner.

Mr. Butner: Judge, I -- you know, this is a premature motion. I don't think it's really fair to say that the defense -- if I understand what Mr. Hammond is suggesting -- he's suggesting that the experts are going to get up there and testify in some fashion that is not consistent with their report.

We haven't seen or heard anything like that and I, quite frankly, don't anticipate that happening at all. I think that, you know, like with any expert witness, you want to interview them. I don't know that I've ever comfortably relied upon an expert's report. The report is one thing but their testimony goes far beyond that.

I mean you can say that about the State's expert. You can say that about the defense expert. We're -- we have had a little bit of difficulty -- and I'll go step-by-step here -- a little bit of difficulty just in logistics in making connections to get the tank top tested.

We do have an agreement, Mr. Hammond accurately states it, that the tank top will be tested at the Chromosomal Lab. I can tell the Court and counsel for

the defense that the State representative at that testing would be DPS Criminalist Courtney Snyder.

Now, it's just a logistically a matter of getting the evidence perhaps transported to Chromosomal Lab so that the testing can take place. I had conversations with the DPS Lab in Flagstaff and Courtney Snyder about that.

Our investigator Mike Sechez, I guess, will be the transporting person. We made arrangements for that and now we just have to make the connection with the Chromosomal Lab and get the evidence down there and get it tested.

THE COURT: Are we thinking that's this week or next week or do we have a date yet?

MR. BUTNER: We don't have a date because we haven't talked with the lab, and I'm looking over at Mr. Hammond, and I would assume maybe it could be accomplished this week. This week or next week probably.

MR. HAMMOND: As I said, Your Honor, we spoke to the people at the laboratory last week, Anne Chapman and I met with them, and they said they will do it any day and I think that this week is certainly -- certainly more than possible.

MR. BUTNER: Okay.

THE COURT: Well, as I said, I have something

else that has to take place on Friday afternoon maybe -- and I know Mr. Sechez is here and maybe he's intending to be here for the rest of the days that we have this going but --

MR. BUTNER: He is, but I think that we can make phone calls probably today and see if we can't just get it set up and get it accomplished.

THE COURT: Is Courtney Snyder based in Phoenix?

MR. BUTNER: No. She's based in Flagstaff.

THE COURT: So you're going to have to make arrangements with her to whatever.

MR. BUTNER: Right, to get her down there.

MR. HAMMOND: Your Honor, if Mr. Sechez, is going to be the go-between, we've worked with him often and I'm happy to offer to communicate directly with him and we'll work out whatever schedule needs to be done if that's all that has to happen.

THE COURT: And if all of this can be accomplished without any additional Court orders to require it, that's great. If you have stipulations that you've already entered and that sort of thing --

MR. HAMMOND: We're going to be here the rest of the week so if something happens and we find that we can't work it out, we'll come back to you while we are

here this week.

MR. BUTNER: I think that's an excellent idea.

THE COURT: Okay. Moving on then, 14 or 15, other items.

MR. BUTNER: Right. Judge, we're awaiting a lab report on those. My understanding is that they have been analyzed. That, almost all of them are just no result so to speak. There are a couple of items that the lab is going to hang on to for additional testing and I'll have a report on that soon. I just haven't gotten it yet.

THE COURT: So whatever biological testing has been done has only indicated victim's blood?

MR. BUTNER: Exactly. We don't have any earth shaking news in that regard but we do have two items that will require some additional testing.

THE COURT: As long as we're going topic by topic, Mr. Hammond.

MR. HAMMOND: Well, I understood from the Court's order back when we were talking about this in early December in your dungeon courtroom that we would be advised of any testing they were going to do. If there are items that they intend to do additional testing on, we would like to know about those things. We'd like to know about them today, if possible.

We can certainly get in touch with our

laboratory and determine whether they foresee any problems with those items but we don't want to wait until after it's done, not at in this point in the case.

THE COURT: And do you have that information that -- is there any other testing anticipated of those items?

MR. BUTNER: Judge, I don't know. I haven't gotten the report from the lab yet and I'm waiting to get the report on the 15 items as to what they found.

THE COURT: The 15 item report will tell you what procedures were used, what they were looking for, that sort of thing?

MR. BUTNER: Exactly.

THE COURT: They're going to include whatever their notes are?

MR. BUTNER: I can get their notes, of course.

THE COURT: Okay.

MR. BUTNER: I just haven't received that stuff yet. I don't know exactly when it was completed. I just found out that it was completed.

THE COURT: Could you deputize your paralegal or Mr. Sechez to check on that so that we have some degree of answer in the next day?

MR. BUTNER: Yes, I will do that.

THE COURT: When the report's out, if it could

be faxed down, if it's done.

MR. HAMMOND: The bench notes are, as we said earlier, they are very important to this process, so --

THE COURT: I don't disagree with that. So if you can have them send the bench notes, that would be --

MR. BUTNER: Okay. I will do that.

THE COURT: -- helpful.

MR. BUTNER: Okay, that's that. In regard to Item 603 the fingernails on the left hand -- fingernails from the left hand of the victim there was DNA found there. The DNA was male. I'm not in a position to tell the Court and argue whether that could have been from incidental contact or not, so called touch DNA. I don't know about that stuff, nor am I in a position to say that could have come from contaminated clippers or not. I don't know about that stuff. That is the subject of expert testimony.

THE COURT: Is that the same expert or experts on that item that are going to be used for doing any of this additional testing, and why has there been a delay in the interview?

MR. BUTNER: Well, there's not really been a, per se, delay in the interview. A delay -- an interview of that expert or those experts has not been requested at this time. Certainly we'll provide an interview.

THE COURT: I guess my question was, and maybe it's helpful to the defense team to know that, and Mr. Hammond in particular, is the expert the same for that as for some of this other ongoing stuff?

MR. BUTNER: I think it is. I think it's Courtney Snyder is the main person that does that sort of testing and analysis but I'm not absolutely sure of that. I don't have all of that committed to memory.

THE COURT: Because then we can see if there is a dispute as to whether or not it can be or can't be incidental touching.

MR. BUTNER: Right. That would be up to whatever the expert has to say.

THE COURT: Thank you.

MR. BUTNER: I don't think this is a -- Judge, you know, I would object to this term post-talk rationalization. I don't think that's what we have here. We don't even know what the expert is going to say. Presumably, it's going to be based upon facts and expert analysis. So I think that to jump to a conclusion in that regard serves nobody in this case.

THE COURT: Well, I guess I'm not willing to jump to that conclusion at this point unless it appears that there is some problem with regard to that. Mr. Hammond indicates that he believes that an honest

expert would say x, y, z. I guess we'll see if the expert says x, y, z in their interview.

MR. BUTNER: Just because they don't agree with Mr. Hammond doesn't mean they aren't honest, Judge.

THE COURT: I didn't say that.

MR. BUTNER: Okay. And then I guess, basically, similarly with the light bulb DNA, I remember Detective Brown's testimony and I can't -- I can't quote from it but he was choosing his words very carefully when he was asked, well, what does this reveal, what does that reveal, and he was trying to accurately set forth what the laboratory reports indicated which were, in essence, well, this is inconclusive, and inconclusive means there is not a conclusion, and that means, of course, that there is no conclusion that it belongs to the Defendant. It's inconclusive.

Now, is there enough there, for example, to exclude the Defendant? I don't know that Detective Brown was in that position. That is certainly the subject of expert testimony and I would expect, of course, any expert taking the stand to testify truthfully in that regard. So that's what we're going to have to wait for.

And lastly, of course, we come back to the point of you can't comfortably rely upon the reports, that you need to interview the experts, because typically there

is more there than simply the bald statements on the laboratory reports that you received and, of course, we will accommodate the defense to set up these interviews at the appropriate time.

THE COURT: Thank you. Mr. Hammond.

MR. HAMMOND: Your Honor, I suggest on the last couple of points, obviously, interviewing the DPS people if they are going to be the witnesses who will testify about this to the exclusion of the Sorenson Laboratory people, whoever the State may wish to call, we would like to know, A, that they are true, so that we're not wasting our time with an interview that will then have to be redone, and as soon as they are through we would like to schedule their interviews, and as soon after that as reasonably possible. We would like to have some time on the Court's calendar and, you know, maybe we will find that it's unnecessary, but I really don't think so, not given the grand jury testimony in this case and not given the history of DPS in other DNA cases. I think we are going to be back here and we ought to plan on it.

This should have of happened months and months ago but it doesn't seem to us too much to ask that we have deadlines for these things and that we have at least tentatively a day when we can be back here in this Court to resolve these issues long before we impanel the jury.

This evidence is really way too important in this case to let it slide to the end.

MR. BUTNER: Just to clarify, I didn't mean to say that the DNA experts will be the DPS Crime Lab Experts to the exclusion of the Sorenson Lab Experts. That is not what I meant to imply. I would anticipate that witnesses from both of those laboratories will be testifying.

THE COURT: All right. I assumed as much. I guess to phrase a proper ruling on this, I don't think I have enough information at this point to rule on the motion in limine concerning limitations on the particular use of phraseology by the experts or adjectives.

I do think that it's appropriate to have an identification by the State of whether the testing is done, when it is done, whether there are any other tests anticipated, that those -- that that information be conveyed to the defense prior to the testing actually occurring so that if they need to seek arrangements through the county attorney's office or through the Court to have participation in any additional testing, that that be done, so we're not too short of time for the testing to be done and for the reports to be generated and the interview to be conducted.

So I will order that that information be provided as soon as possible. No later than the end of

next week. As far as what the schedule is for any additional testing.

MR. BUTNER: Okay. I'm standing to ask are you saying, Judge, that we convey to the defense by the end of next week what the status is of, basically, testing, is it done in regard to each and every item, and that kind of thing?

THE COURT: And, if not, when, what the scheduling anticipates it being done.

MR. BUTNER: Okay.

THE COURT: And when, therefore, interview or a report can be expected and an interview can be done of the experts.

MR. BUTNER: Okay.

MR. HAMMOND: Your Honor, might I ask if there's any reason logistically why that report could not be provided to us this week? I mean, if the report is that there is still an item that has to be done, well, we'll know that, but I think that they have told us that they are near the end.

I believe if someone would place a phone call and push a little bit we could have a report this week and so that if we know we have a problem, we can talk to you about it Friday before the week is over.

THE COURT: All right. I'll modify what I

just did and ask that communication be done by the county attorney's staff. I know that you're with me much of the time, Mr. Butner, so if you can identify a staff member to communicate with the lab to get information about when the report can be anticipated, what additional testing is going to be done, and if you can do it by Thursday of this week so that we know what's going to be coming down the road.

MR. BUTNER: Judge, we've already asked the lab when they're going to be done, when we're going to get a report, and if we can get the bench notes. We've already communicated with the DPS Lab in that regard.

THE COURT: What's the answer?

MR. BUTNER: We haven't got an answer yet. We just did that and so as soon as we get an answer, and hopefully we would have something by the end of the week, to provide to Court and counsel.

THE COURT: Please tell them I'm getting cranky and light a fire under them.

MR. BUTNER: And this is in regard to these 15 items that we've been discussing, if I understand correctly?

THE COURT: And whatever additional testing that there is.

MR. HAMMOND: And if that's all, that's all.

THE COURT: If they're done, that's all we need to know, I think.

MR. HAMMOND: Your Honor, all I can ask on behalf of the defense further than that is if we -- if we do not have a satisfactory answer by Friday, we at least would like to readdress the Court while we're here, while we're all together. It maybe that this is going to be taken care of by then but if not --

THE COURT: Please remind me of that Friday morning.

MR. HAMMOND: Great.

THE COURT: All right. Does that address the issues that you need addressed on the DNA for the time being?

MR. HAMMOND: Yes, Your Honor. Wait a minute. Hang on just a moment. Excuse me.

(Mr. Hammond and Mr. Sears confer sotto voce.)

MR. HAMMOND: And Mr. Sears' suggests that since we know that whenever we get these reports it is very likely we are going to need an evidentiary hearing, it might be well for us to identify a date. If we can't do it today, at least do it this week, so that -- we understand that it may be difficult for the Court's schedule but --

THE COURT: Well, why don't you see what you

can do about getting the information. We'll take that up on Friday and I'll have a date at that point.

MR. HAMMOND: Very good, Your Honor.

THE COURT: Mr. Butner, you had something else with regard to the DNA topic?

MR. BUTNER: I did, Judge. I just wanted to make sure that we exclude from this discussion the stuff that's going to the Chromosomal Lab, you know, that's going to the Chromosomal Lab and we'll presumably find out when it's going to be done and at the same time and the reports and so forth.

THE COURT: Both sides I presume will continue to be cooperating with regard to that particular item?

MR. HAMMOND: Yes, sir.

THE COURT: Yeah, I wasn't intending to apply this to that particular item. All right. The next topic.

MR. SEARS: Your Honor, it's not on the list but yesterday we filed a motion to compel the State to respond to a number of requests we have made over time for supplemental disclosure and in looking at that and thinking about what's just been said about DNA, there are three parts in that motion that relate to DNA evidence.

We asked for information regarding indexing system. This is information we've been asking for for quite sometime and also for additional disclosure from the

DPS and Sorenson Labs. And the history of this motion is that we had made efforts over time, some successful, some not at all successful, to obtain this supplemental disclosure on a voluntary basis from the State but it occurs to me that in the interest of being able to move forward with the things that Mr. Hammond told you we need to be doing in terms of completing the investigation and doing interviews and then coming to Court, if necessary.

We've asked in this motion that the State respond by January 25th with this information. Some of it is coming in drips and drabs from the labs but what we put in the motion are things that we've been asking for continuously that are not yet in our possession from the State.

So I would ask -- although I understand this is a motion and the State has time to respond, I would ask the Court to encourage, if not direct and order, the State to look at those three categories and numerically they are number --

THE COURT: Four.

MR. SEARS: Number 4, Number 7, and Number 8 in our motion, and make their best efforts to get that information to us as quickly as possible.

Again, I think, that if they were in communication with Sorenson and DPS Lab about the matters

that you've already asked them to do, these are topics that they could address with them and, again, in our experience this information is routinely produced by labs including DPS in major DNA cases and isn't something new to them, isn't something foreign to them.

We're not quite sure why they haven't been able to do it but all of this is necessary to us for our evaluation and investigation and preparation for their interviews and to potentially to present our position to the Court.

So I know that I'm getting a bit ahead of myself on this but rather than delay this process -- the only reason we filed the motion was simply because we had come to a position with the State on this where we just weren't getting this information for whatever reason and we now need to push it ahead. And we think that the 25th is a reasonable period of time. That's nearly two weeks out to get this done and we would ask the Court to consider entering the order, unless the State has some good reason to present now why that can't be accomplished.

THE COURT: I recognize that it's a reasonably new motion and you haven't -- have you looked at those particular items with regard to being able to respond from DPS and Sorenson?

MR. BUTNER: Judge, I have, and I'm just

looking at the motion now and I know that we've provided a bunch of stuff from the DPS Lab. I'm not sure what's missing as it relates to this list that was referenced by -- everything on the list, is that what you're saying is not provided?

MR. SEARS: Your Honor, the things that we have listed in the motion are as of yesterday the things that we have asked for not yet received. In fact, we made a change to the Sorenson portion of the motion in view of the 44 supplemental disclosure we got some last minute information that we looked at over the weekend and took that out.

So the answer to Mr. Butner's question is, yes, what's on this list with respect to DPS and Sorenson and the particular questions about which indexing system they have run these testing samples against are all things that we've asked for before and that we do not have answers to or materials in our possession responding to those particular requests. So that's where we are today.

MR. BUTNER: I don't know even -- I don't know enough about this to know what an indexing system is, really, but I was talking about DPS disclosure Item Number 7 and that list of items, and I take it that DPS disclosure and that list of item, I take it, that you're saying that none of those have been provided?

MS. CHAPMAN: Correct.

MR. SEARS: The indexing system is pretty simply are the databases against which these subject samples are being compared and we've been told informally about this but each of those systems has within it separate indexes. For example, there is not one -- simply one CODIS Database. There are subcategories and components within that and we need to know with particularities which of the indexes have been used to compare --

THE COURT: Or not used as an index.

MR. SEARS: Exactly. Exactly. And there's a great deal about that that needs to be developed because it has to do with -- as Mr. Hammond pointed out -- it has to do with the degree to which efforts have been made and using available technology and available resources to try and find the person whose DNA is on evidence Item 603. I just can't think of a reason --

THE COURT: Perhaps some calls since I'm taking an early break today or at lunch time today if somebody on the State side can give me some indication about whether this is going to be something easily provided and so I can set some time limits on it or if it's something that is going to be somehow problematic but if you could run that past --

MR. BUTNER: Judge, we're going to try and do that at the break, you know, get this. Of course, like I said, I just saw the motion. So we will try and get this to the lab and give them a call and see if we can get ahold of somebody to talk to about it.

THE COURT: Lab protocols and that sort of thing I expect can go on for pages. So I imagine that's -- chain of custody documents as well may go on for pages.

MR. BUTNER: We'll check into it, Judge.

THE COURT: Okay. If you could give me some idea of the difficulty or time you're going to need for getting this. I see that it seems as to me that the protocols and that sort of thing should be fairly easily addressed and found. All right. Thank you.

MR. SEARS: Judge, and if I could just -- so that we're all understanding this the same way. Even though the motion indicates that some of these requests were made by us as recently as a month or so ago they are follow-up requests to requests that were made before that.

We didn't think it was necessary to burden this motion with the complete history of this request. These are not things that we've just started looking at and asking, for example, in December of 2009. For the most part they are things we've been asking for much

longer period of time.

What happens is that as things come in and they are evaluated by us and we see that things still asked for are not there, follow-up letters are sent and the letters that are referred to in the motion are essentially follow-up letters.

THE COURT: And the most recent.

MR. SEARS: And much of this, at least to my understanding, much of this is information that's maintained by these labs stuff as protocols that is easily obtainable and my guess would be they have it already electronically and it's a matter of turning it around to us, and both sides have fallen into the custom in this case of exchanging pleadings electronically so they have this motion as an attachment to an e-mail sent to them. So getting it out to the labs should be relatively seamless, I would hope.

THE COURT: All right. Thank you.

MR. SEARS: Judge, there's no one remaining item that I think we could finish up in 20 minutes but I thought maybe this might be a time again to take up the question of the jury selection process at least begin further discussion about that. We had some back and forth about that in chambers off the record this morning but just for the record this is a matter of great importance

to us as I told you.

THE COURT: I would think Number 2 might be faster than Number 1 for the next 20 minutes.

MR. SEARS: Well, then Miss Chapman would be happy to address that, Your Honor.

THE COURT: The Number 1 is going to take a bit of time, I think.

MR. SEARS: Thank you.

MS. CHAPMAN: Which one is Number 1, John?

MR. SEARS: Number 1 is -- Number 2 is prosecutorial misconduct.

THE COURT: I guess I'll note at the outset that some of this pertains to a different prosecutor than the prosecutor we currently have.

MR. SEARS: Whom I saw in the post office last week with his daughter eating an ice cream cone. He seemed very relaxed, Your Honor.

THE COURT: I have no doubt. Miss Chapman.

MS. CHAPMAN: Your Honor, this motion does in some respects relate to, as you mentioned, some statements and arguments that were made by the prior prosecutor but I think it has continued and the primary issue for us is this practice of asking questions and making arguments that are not supported by any evidence in the record and that practice has continued as the State acknowledged, you

know, the prosecutor has an obligation not to just seek a conviction but also to seek justice and they have certain limitations about what arguments they can make and what questions they can ask.

And one of those limitations is, is there foundation, is there evidence to support a basis for the question or for the argument. We provided Your Honor with multiple examples of both the grand jury testimony of questions that were asked that don't have any evidentiary basis. We provided also several examples of speculation on the part of the prosecutor in respect to the arguments made before, Your Honor.

I don't want to repeat all of those allegations but with respect to some of the speculation that's carried on with the present prosecutor, with respect to Mr. Butner, are the speculations about a backpack and the speculation about burning items, wearing overalls, wearing gloves.

MR. BUTNER: Excuse me, but I've never mentioned any of those things.

MS. CHAPMAN: Well --

MR. BUTNER : I would like to make that clear for the record. Never.

THE COURT: We'll hear from you, Mr. Butner.

MS. CHAPMAN: Some of things that have

continued, Your Honor, and we cited to the pages in the grand jury testimony and to the argument about where those statements have been made, but certainly in respect to this testimony about Miss Kennedy's response to her attacker, that the attacker was enraged.

These arguments that have no foundation in the evidence that's been presented. The State has no support for those assertions and the State's response wasn't, we're not going to make those arguments and we think they're inappropriate, we don't intend to continue making them.

The State's response was, well, that was appropriate under the circumstances under which those comments were made. The State doesn't describe what circumstances they're referring to that would make it appropriate to ask questions or make arguments that aren't -- don't have any basis in the evidentiary, no factual foundation and, frankly, Your Honor, I'm not aware of what circumstances would exist that would excuse it or make it okay.

And it is true that with respect to the other item about the OJ Simpson reference that I don't believe Mr. Butner has continued that but that reference was made several times by the prior prosecutor, I think, in an attempt -- only possible way that it could be used as an

attempt to appeal to some kind of fear which is also inappropriate.

And basically, Your Honor, we want to make it clear at the outset that this kind of questioning and these kinds of arguments aren't going to be appropriate in front of the jury. That there's no set of circumstances under which they are appropriate and that the State's going to be bound by this limitation that what arguments they make and what questions they ask have to be founded in the evidence. They have to have some factual foundation for doing it and that's all we're asking.

THE COURT: All right. Thank you. Mr. Butner.

MR. BUTNER: I don't have anything to say.

THE COURT: Now you have a chance to respond.

MR. BUTNER: I said what I had to say, Judge. I really don't have anything to say. I don't plan on engaging in unethical conduct.

THE COURT: It hasn't been my experience in the cases that I've had Mr. Butner in where he has engaged in any kind of that questionable conduct and the motion in limine, therefore, should be granted because all it asks is to prohibit prosecutorial misconduct and in that sense I'm not sure how useful the motion in limine is.

The Court intends to make sure that both sides follow the rules of evidence and any ethical requirements

that are particularly placed on the prosecution. The concerns that Miss Chapman has expressed may have a place in argument but even argument has to be based on the testimony and evidence presented in Court and reasonable inferences to be drawn from that, that's a limitation on defense arguments and limitation on the prosecutor's argument.

So I'll -- I will prohibit prosecutorial misconduct, prohibit any misconduct in the proceedings, and I recognize that in general this is flying the flag or firing the shot across the bow, however you want to describe it.

Formally, this puts the other side on notice about particular concerns. So that, I guess, has accomplished its purpose but I don't -- I have never had the experience with Mr. Butner engaging in that kind of conduct in any previous cases that I've had with him. So to that extent the motion is granted.

We're at quarter to 12. I don't know that I really want to start any new topics at this point. I had preferred to take the lunch break and maybe start up a little bit earlier.

MR. SEARS: Your Honor, there was one matter that we addressed off the record again this matter in chambers that had to do with our continuing concerns about

our inability to confer confidentially with Mr. DeMocker during recesses in this case. And my understanding was that the Court had directed the State to inquire of the sheriff regarding some additional matters about the conditions back up at the old jail at 2505 East Gurley, and I would ask that the State be reminded that this is a matter of continuing importance to us and that to the extent possible the other things that they need to be doing, that they make that investigation inquiry and be able to report back pretty soon to the Court where we are on that.

THE COURT: I think Mr. Butner made a note of it. It's probably on his list of things to do. Do you --

MR. BUTNER: If we could have just a moment, Judge, if we could, just to get that real clear.

THE COURT: Let's go off the record.

(Proceedings were held at the bench off the record.)

THE COURT: All right. We'll recess until 1:30 rather than 1:15. Could I see one of the detention officers?

(Proceedings were held at the bench off the record.)

THE COURT: Okay. I still think I'll take a look down the hall and remind myself of the setup down there and counsel are welcome to come on down as well. I guess what I need to know is if there is -- is that keyed

separately to get into the room?

THE DETENTION OFFICER: It is keyed separately.

THE COURT: Okay. Maybe I can leave Mr. DeMocker here for the time being and just go take a look since nobody is down there right now.

THE DETENTION OFFICER: There should not be anybody down there and I can escort you down there too.

THE COURT: I appreciate that. We'll take a recess and I'll go take a look.

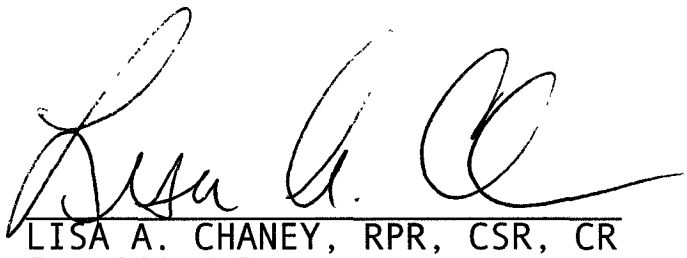
(Whereupon, the noon recess was taken.)

(Afternoon proceedings were reported by Ms. Holly Draper, Certified Reporter.)

REPORTER'S CERTIFICATE

I, Lisa A. Chaney, a Certified Reporter, in the State of Arizona, do hereby certify that the foregoing pages 1 through 83 constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

WITNESS my hand this 21th day of January, 2010.



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